IN THE

Supreme Court of the United States

October Term, 1943.

No. 337.

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

vs.

STOCKHOLDERS PUBLISHING COMPANY, INC.,

Respondent.

BRIEF OF RESPONDENT STOCKHOLDERS PUBLISHING COMPANY, INC.

THOMAS S. TOBIN,
817 Board of Trade Building, Los Angeles,
Attorney for Respondent Stockholders Publishing Co., Inc.

BINFORD & BINFORD,
L. B. BINFORD,
HOWARD M. BINFORD,
1208 Hollingsworth Building,

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BRIEF OF RESPONDENT STOCKHOLDERS PUBLISHING COMPANY, INC.

Respondent Stockholders Publishing Company, Inc., publisher of the DAILY NEWS at Los Angeles, California, respectfully submits herewith its Brief in support of the opinion and decision of the United States Circuit Court of Appeals.

Opinion Below.

The opinion of the Circuit Court of Appeals for the Ninth Circuit is reported in 136 Fed. (2d) 608. [R. 1843 et seq.][1]

[1]Reference to pages of the Record will be herein designated as "R."

Jurisdiction.

The National Labor Relations Board's[2] Petition for Writ of Certiorari was filed September 9, 1943, and granted on October 25, 1943. Jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925, and Section 10(e) and (f) of the National Labor Relations Act (49 Stat. 449, 29 U. S. C., sec. 151 *et seq.*).

Statement of Case.

1. RESPONDENT'S ORGANIZATION—BUSINESS:

Respondent STOCKHOLDERS PUBLISHING COMPANY, INC., is engaged in the business of publishing a daily (except Sunday) newspaper at Los Angeles, California, and has been so engaged for more than seventeen years last past. It publishes a twenty-four hour newspaper which was formerly known as the Daily News and Evening News. [R. 61, 62.] It is now known as the "DAILY NEWS" but will hereinafter be referred to, for brevity, as "THE NEWS." Its circulation within the State of California was 195,191 in March of 1940. [R. 62.]

2. MANNER OF DISTRIBUTION:

With respect to street distribution of its newspapers through newsboys, respondent's operations are as follows:

It *wholesales*[3] its papers to sundry distributors who are known as district men.[4] These men purchase papers from respondent and sell them to various newsboys, news stands, confectionery stores and drug stores. [R. 1127, 1128.]

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[2]The National Labor Relations Board will hereinafter be referred to as the "Board", and the National Labor Relations Act will hereinafter be referred to as the "Act".

[3]All emphasis in this Brief ours.

[4]They are sometimes loosely referred to as district managers.

While the price at which the paper is to be sold to the public is established by respondent and appears on its masthead, the district man has certain discretion with respect to the resale price, it appearing that he sells his papers to the newsboys at one price and to drug stores, sweet shops and news stands at a different price. [R. 1127.] The district man's profit is thus the difference between his purchase price and his sales price of the papers. [R. 1130.]

Respondent contends that neither the district men nor the newsboys are its employees.

3. THE REPRESENTATION PROCEEDINGS:

On June 8, 1940, Los Angeles Newsboys Local Industrial Union No. 75, C. I. O., herein referred to as "the Union," filed its Second Amended Petition for Investigation and Certification of Representatives under Section 9(c) of the Act, alleging *inter alia*, that it was the appropriate bargaining unit for a certain group of newsboys alleged to be employees of respondent. [R. 30, 31.]

One June 5, 1940, such proceeding was consolidated with three other proceedings under Section 9(c) involving three other Los Angeles daily newspapers. [R. 28.][5] Respond

[5]The four cases so consolidated were consolidated solely for the purpose of a hearing before the Trial Examiner [R. 14, 15] and not upon the theory or assumption that evidence applicable to one newspaper would be deemed applicable to another newspaper. The Board in its Decision and Order of March 30, 1942, which is here under review, stated in this respect as follows:

> "In our present decision as well as the Board's decision in the *representation* proceeding hereinafter referred to, *we have not considered evidence with respect to one publisher as applicable to any other publisher.*" [R. 456, Footnote.]

Thus, while the record is replete with stipulations between counsel for the Board and counsel for the various respondents, to such effect, it becomes unnecessary to make reference thereto in view of the foregoing pronouncement in the decision.

ent filed a motion to dismiss the petition on the grounds, *inter alia,* that the Board was without jurisdiction, and that the newsboys were not employees of respondent. [R. 42.] The motion was denied. [R. 79, Footnote 4.] Respondent also answered said petition denying, amongst other things, the existence of the relationship of employer and employee between respondent and the newsboys, whom the Union claimed to represent, and denied that such persons constituted an appropriate bargaining unit. [R. 46.]

Upon the issues thus presented, a hearing was held before the Board's Trial Examiner, and the Board thereafter issued its Decision and Direction of Elections dated January 9, 1941 [R. 76], by which it ordered that an election be conducted in the newsboy group (comprising the alleged appropriate bargaining unit) to determine the matter of representation by the Union. Such election was held on the 14th day of May, 1941, over the objection and challenge of respondent. [R. 157.]

Subsequently petitioner filed its Objection to the Election Report. [R. 165.] Both the challenge and the objections to the report of elections were overruled. [R. 158, 179.] Thereafter the Board filed its Supplemental Decision and Certification of Representatives [R. 187], certifying that the Union had been designated by a majority of the newsboys as their bargaining representative. [R. 195.][*]

4. THE COMPLAINT CASE:

On November 21, 1941, the Union filed a charge against respondent alleging unfair labor practices within the meaning of Section 8, Subsections 1 and 5 of the Act [R. 383], which was followed by the issuance of a complaint by the

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[*]The proceedings referred to above under No. XX-1-R-927 and No. 1923 are herein referred to as the "Representation Proceedings."

Board under date of December 5, 1941 [R. 378], alleging *inter alia*, that the Union was an appropriate unit for the purpose of collective bargaining; that respondent had refused to so bargain and was, therefore, guilty of unfair labor practices. [R. 378.] Respondent filed an answer denying, amongst other things, that the newsboys were respondent's employees; that the bargaining group referred to in the complaint was an appropriate bargaining unit. [R. 388.]

On December 11, 1941, respondent and the Union and the National Labor Relations Board entered into a written stipulation to the effect that there had been no material change in respondent's business since the admission in evidence of Board Exhibit No. 10 on June 19, 1940 [R. 397, 398], and stipulated that if all witnesses called by the parties at the hearing held at Los Angeles between June 10, 1940, and June 27, 1940, were recalled to testify as of the date of such stipulation, that the testimony of such witnesses would be substantially the same. [R. 398.] The stipulation further recited that respondent had failed to comply with the request of the Union to bargain collectively.[7]

Thus, the retaking of testimony in the Representation case was obviated and no further proceedings (except cer-

[7] A portion of this stipulation reads as follows [R. 399]

> "At this conference the Board, the respondent, and the Union were each represented; and the representatives of the respondent in the presence of the representatives of the Union stated in effect that the respondent, although willing to continue its long established policy of meeting and dealing with representatives of the newsboys distributing and selling its newspapers, was not willing to bargain collectively with the Union under the aforementioned certification."

In this stipulation respondent reserved *inter alia* all of its rights with respect to its right to maintain that the newsboys were not employees of respondent, and with respect to its right to controvert the sufficiency of the alleged appropriate unit. [R. 399, 400.]

tain formal requirements) were necessary in the Complaint case prior to submission to the Trial Examiner.

Subsequently the proceeding involving this respondent and the proceeding involving Hearst Publications, Incorporated (Los Angeles Examiner Department)—being two of the four newspapers involved in the consolidated representation proceedings, were consolidated. [R. 364.]

Thereafter, the Trial Examiner filed his intermediate report dated January 7, 1942 [R. 401], to which respondent filed exceptions [R. 442], and orally argued the issues before the Board at Washington, D. C. [R. 454.] On March 30, 1942, the Board rendered its Decision and Order whereby respondent was directed to cease and desist from its refusal to bargain collectively with the Union, and was ordered to bargain collectively upon the Union's request.

Respondent thereupon filed in the United States Circuit Court of Appeals for the Ninth Circuit its Petition for Review of such final Order of the National Labor Relations Board pursuant to Section 10(f) of the National Labor Relations Act (49 Stat. 449; 29 U. S. C. sec. 151 *et seq.*).

After the filing of briefs by the respective parties and oral arguments, the case was submitted and thereafter and on the 10th day of June, 1943, the Circuit Court set aside the orders of the Board directed to respondent, finding amongst other things, that there was no substantial evidence in the record supporting the Board's findings that the newsboys were respondent's employees, which Order and Opinion is reported at 136 Fed. (2d) 608. [R. 1843.]

The Board thereupon filed a Petition in this Court for a Writ of Certiorari which was granted as hereinbefore referred to.

Questions Involved.

There are two basic questions involved in this proceeding:

1. WERE THE NEWSBOYS DESIGNATED IN THE CLAIMED BARGAINING UNIT AND WHO WERE ENGAGED IN STREET SALES OF THE NEWS, EMPLOYEES OF RESPONDENT?*

(A) IS THERE ANY SUBSTANTIAL EVIDENCE IN THE RECORD SUSTAINING THE BASIC FINDINGS OF THE BOARD AND ITS CONCLUSIONS AND DECISION, FINDING AND HOLDING THAT NEWSBOYS ENGAGED IN STREET SALES OF RESPONDENT'S NEWSPAPERS WERE ITS EMPLOYEES?

(B) WHAT IS THE MEANING OF THE WORD "EMPLOYEE" AS USED IN THE ACT?

(C) IS THE DETERMINATION OF SUCH MEANING A QUESTION OF LAW AND, THEREFORE, A MATTER FOR JUDICIAL DETERMINATION OR IS IT A QUESTION OF FACT FOR DETERMINATION BY AN ADMINISTRATIVE BODY?

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*The record discloses the fact that the contention that such newsboys were not employees of respondent was repeatedly urged from the very commencement of the "Representation" proceeding, continuing to the conclusion of the "Complaint" case:

(See Motion to Dismiss Petition for Investigation, etc. [R. 42]; Answer of Respondent to Second Amended Petition for Investigation, etc [R. 47]; Respondent's Challenge to Election [R. 148, 149]; Objections of Respondent to Election Report and the Conducting Thereof [R. 165, 166]; Respondent's Motion to Dismiss Complaint [R. 384 at 385]; Answer to Complaint [R. 388 at 391]; Exceptions of Respondent to the Intermediate Report, etc. [R. 442 at 450].)

2. WAS AN APPROPRIATE BARGAINING UNIT, COMPOSED OF RESPONDENT'S ALLEGED EMPLOYEES, ESTABLISHED?

(A) IS THERE SUBSTANTIAL EVIDENCE IN THE RECORD TO SUPPORT THE FINDINGS OF THE BOARD OF THE EXISTENCE OF AN APPROPRIATE BARGAINING UNIT CONSISTING OF EMPLOYEES OF RESPONDENT?[9]

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[9]Likewise the record shows with respect to this question that respondent has consistently contended that no appropriate bargaining unit was established.

(Answer of Respondent to Second Amended Petition for Investigation, etc. [R. 47]; Answer of Respondent in Complaint case [R. 388 at 389]; Exceptions of Respondent to Intermediate Report, etc. [R. 442 at 443 and 444].)

Summary of Argument.

Point I.

(a) THERE IS NO SUBSTANTIAL EVIDENCE SUPPORTING THE FINDING OR CONCLUSION OF THE BOARD THAT THE NEWSBOYS ENGAGED IN STREET SALES OF THE NEWS AND WITHIN THE CLAIMED BARGAINING UNIT WERE EMPLOYEES OF RESPONDENT.

(b) THERE IS NO SUBSTANTIAL EVIDENCE SUPPORTING THE FINDING OR CONCLUSION OF THE BOARD THAT THE DISTRICT MEN (BEING THOSE PERSONS WHO SOLD PAPERS TO AND DEALT WITH THE NEWSBOYS) AND WHO BOUGHT AND SOLD AT WHOLESALE RESPONDENT'S NEWSPAPERS, WERE EMPLOYEES OF RESPONDENT.

(c) THERE IS NO SUBSTANTIAL EVIDENCE SHOWING CONTROL BY RESPONDENT OVER THE NEWSBOYS.

(c-1) SUBSTANTIAL EVIDENCE AS APPLIED TO FINDINGS IN (a) REPRESENTATION PROCEEDINGS, AND (b) COMPLAINT CASE.

(d) THE TERM "EMPLOYEE" AS USED IN THE ACT SHOULD BE GIVEN ITS LEGAL AND CONVENTIONAL MEANING.

(e) THE DETERMINATION OF THE MEANING OF THE WORD "EMPLOYEE" AS USED IN THE ACT IS A LEGAL QUESTION, AND HENCE A FUNCTION OF THE COURT AND NOT OF AN ADMINISTRATIVE BODY.

Point II.

THERE IS NO SUBSTANTIAL EVIDENCE SUPPORTING THE FINDING OR CONCLUSION OF THE BOARD THAT THE CLAIMED BARGAINING UNIT FOR THE ALLEGED EMPLOYEES OF RESPONDENT WAS AN APPROPRIATE UNIT.

THE RULE FIXING AND BASIS FOR DETERMINING ELIGIBILITY FOR MEMBERSHIP IN THE UNION IS DISCRIMINATORY, ARBITRARY AND CAPRICIOUS.

ARGUMENT.

POINT I—(a) AND (b).

(a) There Is No Substantial Evidence Supporting the Finding or Conclusion of the Board That the Newsboys Engaged in Street Sales of the News and Within the Claimed Bargaining Unit Were Employees of Respondent.

(b) There Is No Substantial Evidence Supporting the Finding or Conclusion of the Board That the District Men (Being Those Persons Who Sold Papers to and Dealt With the Newsboys and Who Bought and Sold at Wholesale Respondent's Newspapers) Were Employees of Respondent.

The testimony produced with respect to this respondent is comparatively brief. Consequently, before proceeding with a discussion of the applicable law we will briefly analyze and comment upon such testimony.

Analysis of Evidence.

There were only *four* newsboys and *two* district men called as witnesses by the Board in connection with its case against respondent.

They were Frank Benjamin Smith, Edward Victor Smith, James V. Apice, Thomas Hilliard Ash (all newsboys), and Sidney Glenn Murray and Isaiah Jacob Moore (both district men). Dutton O'Brien, circulation manager for respondent, also gave certain brief testimony.

The record shows that certain newsboys regularly sold both the "Herald and Express" and the News [R. 1066]. In a few instances witnesses called by the Board in connection with the proceeding involving the respondent

Hearst Publications, Incorporated (Los Angeles Evening Herald and Express Department) incidentally gave some testimony respecting their dealings with district men selling respondent's newspaper. To such extent we will refer to such testimony.

The testimony directly involving respondent Stockholders Publishing Company, Inc., is reported commencing at R. 1065 and continuing to R. 1145.

The testimony of these witnesses will be analyzed with respect to extent, character and nature of respondent's alleged control, and other alleged indicia of the employer-employee relationship.

Frank Benjamin Smith (newsboy) testified (on direct examination) that the "News" (respondent) supplied him with two racks; that a district man of the News told him to put the papers in the racks [R. 1098] and at what corner he was to sell and the hours he was to work [R. 1099].[10] He testified on cross-examination to extended experience in selling newspapers, and that he knew when he was supposed to start selling papers, what the racks were to be used for, and how they should be used, and that he needed no instructions with respect thereto. That he paid the district man for his copies of the paper at the rate of two cents, paying for them after he had sold them [R. 1102].

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[10]A realistic approach to the question of "time to work" should be adopted. Nothing is more perishable than a newspaper, and to contend that because a boy selling newspapers is "required" to sell the various editions at or about the time they first appear on the street for sale, that such requirement is an evidence of authority or control, in our opinion is not meritorious. It goes without saying that any boy who proposed to try to earn money out of the sale of newspapers would make it his business to find out when the papers were ready for sale and where he could get them without finding it necessary to be "instructed" or "ordered" in such respect.

That he received full credit for all returns; that the racks helped him sell his papers, and that when he first came to work he already knew the time that the first edition of the newspaper appeared on the street [R. 1105].

Comments: The testimony of this witness falls far short of evidencing that "complete control" required by the law to establish the employer-employee relationship. There was no evidence offered by this witness or any other witness in respondent's case indicating or even inferring that the alleged instructions given or the alleged authority exercised, was typical with respect to other newsboys selling respondent's newspapers.

Edward Victor Smith (newsboy) testified on direct examination that the News district man (Lou Law) placed him on a new corner and told him that

> "there would be a man there to show me around where the racks was and where I was to go. That was all there was to it." [R. 1109.]

On cross-examination he testified he also sold the Examiner and the Times, making a profit therefrom; that he bought them at wholesale "out of my own pocket" [R. 1111]. That he made changes as to the amount of his order to the News district man, and that he usually told the district man the day before how many papers he would want [R. 1111-1112]. He also testified that he was engaged in another business—*operating a flower market*—and that therefore he arranged for the delivery of his papers at a different corner because it was more convenient for him [R. 1112].

Comments: The testimony of this witness offers no evidence of any real control. On the contrary he stated that he made changes in the amount of his order, that he

had the place for delivery of his papers changed at his own request because it was more convenient to him in operating another business.

James V. Apice (newsboy) testified on direct examination that he obtained his corner from a friend. *That he had three boys working for him* [R. 1118]. That his district man told him to "try to keep the boy out there" (a traffic spot) at a certain time [R. 1120]. That the district man said nothing else [R. 1120] except about the manner of displaying (or holding) the papers. This witness was not cross-examined. No evidence was adduced to show that he was a *full time newsboy*, or for that matter that he sold any particular editions or during what hours or how many days a week he worked.[11]

Comments: Practically all of the testimony of this witness indicated *his own control of his own business.* He testified that he obtained his corner from a friend and that he had three boys working for him. There was no testimony offered respecting any other matter or thing except that the district man had told him to "try to keep the boy out there" (a traffic spot) and respecting the manner in which papers were to be displayed.

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[11]Respondent and the Board entered into the following stipulation respecting the meaning of the term "full time" newsboys [R. 141]:

> "With respect to the News, the term 'full time' newsboy means a newsboy who sells to the general public, Five, Six, Eight, Nine and Ten Star editions, or Six, Eight, Nine and Ten Star editions of the News, five or more days a week, and means a newsboy who sells the Four Star edition and previous editions of the News for a minimum of four hours per day between the hours of 4:00 o'clock A.M. and 10:00 o'clock A.M., five or more days a week."

Thomas Hilliard Ash. (Newsboy.) Testified that he was also (in addition to being a newsboy) a checkman[12] and operated at Wilshire and Westlake, and that as a "checkman" he counted out newspapers to one other newsboy.

Comments: This witness having offered no material testimony, comments are unnecessary with respect to his testimony.

Sidney Glenn Murray. (District Man.) Testified that he was a district man handling the Four Star edition of the News, that he supplied ten newsboys, some school boys, some men [R. 1114]. Queried as to the price at which he supplied the newspapers to the newsboys, he stated:

> "Two cents apiece, with the exception of those that I give a little bonus, but that personally is between me and the boys. That don't concern the Company at all." [R. 1115.]

Further quoting from the testimony of this witness, at [R. 1115-1116]:

> "Q. And so far as the price at which you furnished papers to the newsboys is concerned, is that fixed by the company or by you? A. *That is fixed by me.*"

Comments: It should be particularly observed that this witness (one of two district men handling respondent's newspapers) called by the Board, testified *that he fixed the*

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[12]The record discloses that respondent employed certain boys for the restricted purpose of delivering or counting out newspapers to other boys. That such boys were commonly referred to as "check men". They were admittedly carried on respondent's payroll, Social Security was deducted from their compensation, and there is no issue with respect to their employment by respondent for this restricted purpose. [R. 1089-1090-1637.]

price at which he sold his newspapers to the newsboys and gave them bonuses out of his own pocket.

Isaiah Jacob Moore. (District man.) Testified that he was a district man, supplying ten all day boys and twenty or thirty boys that worked after school [R. 1126]. That he serviced approximately twenty-two news stands [R. 1127]. That he bought his papers at wholesale from the News and sold them to the boys at one and three-quarters cents each, and to the news stands at two cents each [R. 1127]. That the news stands comprised sundry businesses such as confectionery stores, sweet shops and drug stores [R. 1128]. On redirect examination Mr. Moore testified that he received a "minimum guarantee."

Comments: These were the only two district men called. It will be observed that one district man sold his newspapers to newsboys at one price *which was fixed by him*, and another district man sold his newspapers to newsboys at another price fixed by respondent, but that he (Moore) sold his newspapers to persons other than newsboys at an increased price. It is earnestly contended that there is no substantial evidence adduced by the testimony of these two district men justifying the conclusion or finding that the district men were employees of respondent. Particularly is this true when considered in the light of the only other testimony in the record offered with respect to the status of the district man.

This testimony was offered by Mr. Dutton F. O'Brien, circulation manager for respondent, who testified [R. 1130]:

"Q. I will ask you whether or not the Stockholders Publishing Company, or the News, fixes the price at which its district men sell the paper or may

sell the papers to newsboys or news stands? A. *It does not.*

Q. Is that function of fixing the price at which the paper is sold to the newsboys or to the so-called wholesalers and to the news stands *entirely in the discretion of the district man*? A. It is.

Q. You sell—by 'you' I mean the Stockholders Publishing Company sells its papers to these district men at a certain wholesale price, is that correct? A. Yes.

Q. And they in turn sell to the news stands and to the news boys, is that correct? A. That is right.

Q. Their (the district men) profit is the difference between what they buy for and what they sell for, is that correct? A. Yes.

Q. And it is discretionary with them as to their selling price? A. Yes."[13]

In so far as the direct case against respondent is concerned, the foregoing constitutes a condensed statement of

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[13]Mr. O'Brien further testified on direct examination by the Board, as follows [R. 1082]:

"Q. When do they (district men) make their return of collections from street sales? A. Our men work *on a wholesale basis;* they pay their bills the next morning for the preceding day's papers which are furnished to them."

Further, Mr. O'Brien testified [R. 1085] when queried with respect to certain conversations he had had with a newsboys' committee with reference to "the price at which the newsboys received the copies of the News that they sell," as follows:

". . . . . I don't remember what specific questions he (Pat Comorre) may have asked, nor what my answers might have been, but I do remember in substance that I referred the committee and its members to the district managers (district men) *who have full control over the prices at which they sell to the newsboys.*"

all material testimony offered bearing upon control by respondent over newsboys or district men selling its papers.

In the case involving the "Herald-Express," the Board called certain newsboys who also sold respondent's newspaper, and who in some instance testified with respect to alleged instructions or suggestions given them by the district men selling respondent's papers, viz:

Sid Faber. (Newsboy.) Testified that he had an understanding or that he was told by a News district man how the respective papers (Herald and News) were to be held when being offered for sale [R. 725-726].

Harry Relish. (Newsboy.) Testified that the News district man told him he would "have to be all the time on this (corner) spot because we want to sell papers" [R. 733]. He further testified, however, that he had been away from his corner, due to illness, sometimes two or three hours a day, and as frequently as twice a week, and that during such times he had procured *his own relief man* [R. 738].

Queried as to why he had been staying off the corner, he testified [R. 737]:

> "Well, only at the time when I had to go away. For instance, to get treatments, when I was sick. I put a relief man on. I put a relief man on."

He further testified that he used his own money for the *purpose of purchasing the corner on which he sold papers*, and for the purchase of magazines which he handled in addition to newspapers [R. 736].

It is respectfully submitted that such testimony, whether considered separately or cumulated with other testimony

herein adverted to, offers no substantial evidence of "control."

Arthur Steuart. (Newsboy.) Testified that on several occasions he was instructed by the News district man as to how to carry the News [R. 750] and with respect to the use of racks furnished by the News [R. 756]. On cross-examination he testified that he knew what the racks were for without being told; that he could tell by just looking at them what they were for, and that the News district man did not give him any instructions as such, but suggested it would be a good plan to keep a paper in the rack [R. 776-778].

He also testified that the News district man regulated the orders, but did not tell him how many papers he should have, and gave him full "returns" [R. 789].

He further testified [R. 788] that he sold the Examiner and the Times and made a profit of two cents on each sale, and that he handled sundry other publications, including Saturday Evening Post, Life, Liberty, Look and Collier's.[14]

Comments: The only testimony offered by this witness with respect to this respondent bearing on alleged control, was with respect to the manner of displaying or holding the newspaper and with respect to the use of the racks. In this respect he testified that he received no instructions as such, but merely suggestions. Further comment respecting the method of holding the papers will be made later in this analysis.

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[14]Many of the newsboys testified that they handled sundry publications.

David Kadesh. (Newsboy.) Testified that the News district man had given him instructions with respect to the use of the News racks. The nature of the instructions were not further disclosed [R. 811]. He further testified that he knew what the News racks were for; that he needed no instructions respecting the same [R. 814].

Gene LeRoy Alley. (Newsboy.) Testified that the News district man told him how the News should be handled (*i. e.* how to hold or display them) [R. 819] and that he was told by a district man to go ahead and handle the News even though he had been told contrariwise by a Herald district man [R. 820]. That he was furnished certain advertising placards by the News [R. 822].

Philip Spampinato. (Newsboy.) Testified that he was told how to hold the paper by a News district man [R. 832, 833]. That he was told by a News district man to put certain advertising placards on a box [R. 835]; that the placards helped him sell the papers by advertising certain features [R. 842].

Sam Kahn. (Newsboy.) Testified that he used racks belonging to the News and that the district man from time to time furnished advertising placards. That he was told to put them into the racks [R. 903]; that the use of the racks and the placards helped him sell the papers [R. 909].

The sparsity of any material testimony bearing on control offered by the four witnesses last named (called in the Herald-Express case) obviates the necessity of any comments thereon.

Summation of Testimony.

After a careful examination of the record we find no testimony other than that referred to in the foregoing analysis which was offered by the Board bearing upon control allegedly exercised over newsboys selling respondent's newspaper, or bearing upon any control of respondent over the district men handling at wholesale, respondent's newspapers.[15] Summed up, and accepting all of the testimony at its face value, such testimony adduced merely shows:

(a) That the newsboys were furnished with placards (advertising matter) and display racks without cost to them. That in some instances they were instructed by the district man *who was not respondent's employee*, how to use them.

(b) That they were told by a district man (not an employee of respondent) how to handle or hold or display the News with relation to the handling, holding or displaying of the Herald-Express.[16]

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[15]Manifestly, unless it is established by substantial evidence in the record that district men buying and selling at wholesale respondent's newspapers were employees of respondent, the newsboys could not be held to be employees of respondent. Such "instructions" as were given to the newsboys and such "control" as was exercised over them emanated exclusively from district men.

[16]It, however, appears from Stockholders' Exhibit No. 3 [R. 493] that the newsboys did not know what was expected of them in this respect, and decided to "iron" out the problem themselves. A part of the exhibit, which was a notice of a meeting of the Newsboys' Union, follows:

"How shall a newsboy hold the Herald & News?

"Now that the day newsboys are selling both the Herald-Express and the Evening News, just what is expected of them by the publishers?

"There have been a lot of rumors and each newsboy seems

(c) That the newsboys were told by such district men where they could sell their papers and in some instances the hours during which they were expected to sell; but in some instances these spots or corners were the subject of barter and sale.

That in *one* instance a newsboy's selling location was transferred by a district man (not an employee of Respondent). However, it also appears that in another instance the corner was "bought" by a newsboy.

(d) That with respect to this respondent the newsboys had the right to regulate their own orders.[17]

It is here proper to comment on the fact that inasmuch as the newsboys selling the News were allowed *full returns* on unsold newspapers [R. 789, 471], the question as to whether or not the district men determine the number of newspapers which were left with the newsboys from time

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to have a different opinion on the matter. Let's get to the bottom of this problem!!

"This meeting is being called for the purpose of setting a standard guide for all newsboys and to establish a permanent arrangement on this matter."

This pamphlet, issued by the Union, clearly shows that no definite or understandable instructions had ever been given, but that per *contra*, the newsboys themselves proposed to settle their own problems in their own way and recognized no right of control by the district men.

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[17]Edward Victor Smith [R. 111-112], newsboy selling respondent's papers, testified in this respect as follows:

"Q. And do you give your district man some idea as to how many papers you may want from time to time, or do you leave that entirely to him? A. Several mornings I have to make a different—I have to change.

Q. Then you have that within your own control as to how many you want to order? A. I usually tell him the day before.

Q. As to how many you will want? A. Yes, sir."

to time could have no possible bearing on the matter of respondent's alleged control of the newsboys. It is obvious that so long as the newsboy had this right of "full returns", that the giving to him by the district man of more papers than he might sell was not the exercise of any control whatsoever. Such practices are common throughout the country in the handling of magazines and various other publications.

While there is evidence (testimony of Patrick Comorre) [R. 862, 863] that there were between 650 and 700 newsboys selling the Herald-Express and the News, and an estimate by Mr. Patrick Comorre that there were 210 to 212 of what "I considered was full time newsboys and checkmen" [R. 864], and while the list of checkmen furnished by respondent [R. 1091] contained approximately 110 names, the findings of the Board hereinafter referred to are predicated solely on the testimony of these few isolated cases, and no testimony was offered to show that such instances were typical of the operations between district men and newsboys.

There is no evidence in the record showing that the newsboys, comprising the alleged appropriate unit, were carried on the payroll of respondent, or that respondent paid Social Security upon them. Nor is there any testimony in the record showing any contact whatsoever between respondent and the newsboys by or through respondent's employees, agents or representatives, nor showing that any instructions were given or control exercised by respondent over such newsboys. There is no evidence showing that respondent kept any list or record of the names of newsboys selling its papers or the addresses or locations at which the papers were sold by such newsboys. All "hiring" was done by the district man.

POINT I(c).

There Is No Substantial Evidence Showing Control by Respondent Over the Newsboys.

Evidence upon which the Board's Findings are predicated must be substantial evidence. The Findings of the Board are not conclusive unless supported by substantial evidence. The right to determine whether or not the evidence adduced is substantial is the prerogative of the Court.

National Labor Relations Board v. Columbia Enameling and Stamping Company, 306 U. S. 292, 299-300:

"Section 10(e) of the Act provides: '. . . The findings of the Board as to the facts, if supported by evidence, shall be conclusive.' But as has often been pointed out, this as in the case of other findings by administrative bodies, means evidence which is substantial, that is, affording a substantial basis of fact from which the fact in issue can be reasonably inferred (citing cases). Substantial evidence is more than a scintilla, and must do more than create a suspicion of the existence of the fact to be established. 'It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'"

Consolidated Edison Co. v. National Labor Relations Board, 305 U. S. 197, 229;

National Labor Relations Board v. Virginia Electric & Power Co., 314 U. S. 469, 476;

Washington, Virginia & Maryland Coach Co. v. National Labor Relations Board, 301 U. S. 142, 147;

National Labor Relations Board v. Sun Shipbuilding & Dry Dock Co. (3 C. C. A.), 135 F. (2d) 15, 25.

It is well recognized that the nature, extent, power and right of control *over the means and methods of performance* is the most important element for consideration in determining the existence of the employer-employee relationship. As stated in

> *Standard Oil Co. v. Anderson*, 212 U. S. 215, 222, 53 L. Ed. 480, 484 (1909):
>
> "Here we must carefully distinguish between authoritative direction and control and mere suggestion as to details or the necessary co-operation, where the work furnished is part of a larger undertaking. These principles are sustained by the great weight of authority. . . ."

There are numerous State Court decisions involving this question.[18] The leading case in California is

> *New York Indemnity Company v. Industrial Accident Commission*, 213 Cal. 43, 1 Pac. (2d) 12.

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[18] *Bohanon v. James McClatchy Pub. Co.*, 16 Cal. App. (2d) 188, at 196, 60 Pac. (2d) 510:

> "It is now settled in California that the question of whether an individual is an employee or servant of another or whether he is an independent contractor is to be determined, in the final analysis, by the *right of control* which the assumed employer is entitled to exercise over the actions of the assumed employee."

In the case of *Batt v. San Diego Sun Pub. Co.*, 21 Cal. App. (2d) 429, at 436, 69 Pac. (2d) 216, 219 (1937), the Court quoted with approval from the case of *Bohanon v. James McClatchy Pub. Co.* (*supra*), in discussing the control test to determine the existence of the employer-employee relationship, as follows:

> "However, in this connection it must be borne in mind, as heretofore observed, that the control which is recognized as the test of the relationship means *unqualified control, complete control*, and that in the very nature of things, a person who is beneficially interested in work which another is performing for him *is permitted to* exercise some measure of control with-

Here the facts disclosed that the newsboy was allotted his selling spot, he was required to be diligent in selling his papers, and such spot was protected as against sales by other boys by the district manger, who also supervised the activites of the newsboy. He sold for two different publishers. The Court held, page 49:

> ". . . we are constrained to hold that the limited amount of control which the publishers of these two newspapers undertook to exercise over the newsboys . . . who daily purchased from their district manager a specified number of copies of their daily issues for a specific sum, payable in cash or at the close of each day's sales, and who undertook the retailing of the same to such customers among the public at large as they were able to attract or procure at a specified place and price fixed by the publishers, would not as a matter of law be sufficient to constitute such newsboys the employees of the publishers of said newspapers. . . ."

Considerable capital has been made by the Board out of the statement of Mr. Isaiah Jacob Moore (News district man).

"I have a minimum guarantee" [R. 1129].

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out incurring the responsibilities or acquiring the immunities of a master, with respect to the person controlled."

Western Indemnity Co. v. Pillsbury, 172 Cal. 807, 159 Pac. 721, 723, 724 (1916);

Barton v. Studebaker Corp., 46 Cal. App. 707, 189 Pac. 1025, 1029 (1920);

Rathbun v. Payne, 21 Cal. App. (2d) 49, 68 Pac. (2d) 291, 292 (1937);

Winther v. Industrial Accident Commission, 16 Cal. App. (2d) 131, 60 Pac. (2d) 343, 345 (1936).

California Labor Code, Sec. 3000, St. 1937, p. 261:

"A servant is one who is employed to render personal service to his employer, other than in the pursuit of an independent calling, and who in such service remains entirely under the control and direction of the employer, who is called his master."

Although the Board made extensive findings based on this statement,[19] which respondent submits are not sustained thereby, it is submitted that a "minimum guarantee" is not evidence indicative of the employer-employee relationship. The Court, in the case of *Bohanon v. James McClatchy Pub. Co. (supra)*, in connection with its discussion as to what consideration should be given to the *method or manner* of payment, in determining the relationship of employer-employee, held:

> "If, however, the compensation amounts to a *specified recompense for a designated result*, it may not be contended with hope of success that it is indicative of a relationship of employment."[20]

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[19]The Board found [R. 468]:

> "If the earnings of a district manager are less than the guaranteed minimum, the News pays him an amount sufficient to yield the district manager the minimum guarantee. In the event the district manager's income exceeds the minimum guarantee, he retains the excess . . . . the minimum sum guaranteed by the News to its district managers is no more than a fixed salary bearing another label. The so-called profit above the minimum guarantee is merely a variant of the bonus or commission system typical of nearly all mercantile business."

[20]In the case of *New York Indemnity Company v. Industrial Accident Commission (supra)*, the Court referred with approval (at p. 48) to the case of

> *Hillen v. Industrial Accident Commission*, 199 Cal. 577, 250 Pac. 570,

stating that in that case

> ". . . it was held by this Court that the essential test by which to determine whether in doubtful cases the relation between a workman and those for whom he was rendering service was that of an employee or of an independent contractor, was not so much dependent upon whether he received wages or whether he was to devote all or a portion of his time to the performance of his specified service, but was rather dependent upon the extent of control or right of control which the so-called employer was to exercise over its so-called employee."

POINT I (c-1).

Substantial Evidence as Applied to Findings in

(a) THE REPRESENTATION PROCEEDINGS:

Respondent submits that there is no substantial evidence (and in several instances no evidence whatsoever) as to this respondent, sustaining any of the following findings of the Board found in its Decision and Direction of Elections and Statement of the Case [R. 77] viz:

> 1. "He (the district man) receives for his services a fixed salary or a guaranteed minimum plus commissions. His name is carried on the company payroll, and admittedly, he is an employee of the publisher." [R. 89, 90.]

Comments:

There is *no* evidence as to this respondent that the name of the district man is carried on the payroll or that admittedly he is "an employee of the publisher" or that he has a fixed salary. The testimony of circulation manager Dutton F. O'Brien and the testimony of district man Sidney Glenn Murray, hereinbefore quoted, is precisely to the contrary. While district man Murray, as well as O'Brien, both testified that the district men established their own selling prices of newspapers to newsboys, thus negativing any probability of the establishment of a "guaranteed minimum," district man Moore testified, respecting his arrangements with respondent [R. 1129]:

> "Well, I have a *different* set-up than that. I have a minimum guaranty."

This statement of this one witness is *the only testimony in the entire record* of which we are aware, that could be used in establishing any part of the foregoing findings. It is earnestly urged that such evidence cannot be considered "substantial evidence."

2. "Each district manager . . . delivers the newspapers or directs company employed truck drivers to haul the newspapers, wrapped in bundles and addressed to specific newsboys in trucks provided by the publisher." [R. 90.]

Comments:

There is no testimony in the record sustaining this finding as to this respondent. In fact there is no evidence in the record to indicate that respondent kept any record of the names of its newsboys save only the "checkmen."

3. "The newsboys retain for themselves as earnings, the difference between the amount *they pay the publisher* for the newspaper and the sum they receive for it from the public." [R. 92.]

Comments:

There is no testimony in the record showing that the newsboy pays the publisher (this respondent) any sum whatsoever for the papers the newsboys sell. All of the testimony offered with respect thereto is to the effect that the newsboys buy the papers directly from the district men, who have already purchased the papers from respondent. See testimony hereinbefore quoted of Mr. O'Brien, Mr. Murray and Mr. Moore.

4. ". . . it is undenied that the district managers unilaterally determine the number of 'extra' papers in excess of the established order which the newsboys must attempt to sell." [R. 92.]

Comments:

There is no testimony in the record to sustain this finding with respect to this respondent. The only testimony offered respecting the establishment of an order or the determination of the number of papers which the newsboy purchased was that of Edward Victor Smith, whose testimony to the effect that he told his district man the day before how many papers he would want has been hereinbefore quoted, and the testimony of Arthur Steuart, hereinbefore quoted, also negativing the finding above quoted.

5. "The record is replete with instances in which district managers have removed, permanently or temporarily, newsboys from their corners or transferred them from one location to another, for various reasons." [R. 100.]

Comments:

In so far as this respondent is concerned, the record is not "replete" with any such instances. Just *one* witness, Edward Victor Smith, whose testimony is hereinbefore quoted, testified that his corner had been *changed*, but further stated that he changed the place where he was to receive his papers so it would be more convenient for him in connection with the *operation of his flower business.*

There is no testimony in the record of which we are aware, indicating that any district men selling respondent's

newspapers, have removed (as distinguished from transferred) any newsboys either temporarily or permanently from their corners.

6. "In certain instances, however, the companies have objected to the newsboys handling competing publications." [R. 106.]

Comments:

In so far as this respondent is concerned, there is no evidence to sustain such finding.

7. "Through the district managers, who are authorized to act as publishers' representatives in the circulation and distribution of their newspapers, the companies hire the newsboys by the allotment of corners and spots, thus providing them with a place to work, . . ." [R. 108, 109.]

Comments:

There is no evidence in the record to show that the district men are authorized to act as this respondent's representatives in the circulation or distribution of newspapers —or for any other purpose. There is no evidence in the record sustaining the finding that this respondent hires newsboys. *Per contra*, district man Sidney Glenn Murray testified that he hired his own newsboys.[21] We believe this

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[21]Testimony of Sidney Glenn Murray [R. 1116]:

"Q. Would you outline in general what you say to these people (prospective newsboys) when you put them on the corners? A. Well, nothing. Only that they come to me for a job and I ask them if they want to cover that spot and if they like it, why to keep it and if they don't I will have to look up somebody else, either me or the Examiner or Times fellow.

Q. Do any of those boys in your district handle other papers? A. They all handle all three of them, *my boys*."

is the only evidence in the record on this question, nor is there any evidence that this respondent allotted corners or spots to newsboys.

8. "Moreover, the companies control the number of papers delivered to the newsboys for the purpose of sale . . ." [R. 109.]

Comments:

This finding is not sustained by any evidence in the record.

9. "Furthermore, the companies at will discharge the newsboys, transfer them to other locations, and lay them off as disciplinary measures." [R. 109.]

Comments:

There is no evidence in the record as to this respondent of any discharge of newsboys or of the exercise of any disciplinary measures by the company, nor is there any evidence of any "lay-offs" by the company. As previously stated, there is evidence of one transfer from one corner to another, of one newsboy by a district man.

(b) THE COMPLAINT CASE:

It is respectfully submitted that the following findings are not supported by any substantial evidence.

1. "We find as did the Trial Examiner, that . . .

"(b) All full time newsboys and checkmen who are engaged to sell the News within Los Angeles, California, excluding bootjackers, temporary, casual, and part-time newsboys, constitute units (a unit) ap-

propriate for the purposes of collective bargaining with respect to rates of pay, wages, hours of employment and other conditions of employment. We further find that the aforesaid employees at all times material herein, constituted and now constitute units appropriate for the purposes of collective bargaining. . . ." [R. 464.]

2. "We find, as did the Trial Examiner, that on and at all times after July 30, 1941, with respect to the News . . . the Union was the duly designated bargaining representative of a majority of the employees in each of the aforesaid appropriate units . . . . ." [R. 465.]

3. "News district managers, in at least some instances, unilaterally determine the number of papers allocated to newsboys for sale." [R. 470.]

4. "We find, as did the Trial Examiner, that the respondent News, on August 27, 1941, and at all times thereafter . . . has (each) refused to bargain collectively with the Union as the exclusive representative of its employees in an appropriate unit, and has thereby interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act." [R. 472, 473.]

The comments made with respect to the findings in the Representation Proceedings apply also to the findings, quoted above, in the Complaint Case.

POINT I(d).

The Term "Employee" as Used in the Act Should Be Given Its Legal and Conventional Meaning.

As the Board would have no jurisdiction over the controversy unless the newsboys are employees of petitioner—National Labor Relations Act, Sections 1, 2 (3), (5), (9), 7, 9 (a), (b) and (c)—it is first necessary to determine their status and therefor to determine the meaning of the word "employee" as used in the Act.

No enlightening definition is given in the Act. Section 2 (3) provides as follows:

> "The term 'employee' shall include any employee . . ."

Then follows certain inclusions and exclusions which are immaterial to the case at Bar.

In the light of such definition, respondent contends and at all times in these proceedings has contended that the word "employee" should be considered in its conventional, well-recognized meaning and sense as developed under the common law and Statutory Enactments.[22]

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[22]The Court below sustained petitioner's contention in this respect:

> "Since the term 'employee' is not defined in the Act, we agree with petitioners' contention that it must be given its conventional meaning as developed under the common law and statutory enactments. Such a result is in accord with the basic theory of statutory interpretation that the legislature is presumed to use words in their ordinary sense *unless that sense is contradicted by the context of a statute.*" [R. 1848.] (Citing various cases.)

It is submitted that the use of the word "employee" in its conventional sense is not contradicted by the context of the Act in defining the word "employee."

Counsel for the Board, however, have contended that the determination of the meaning and the scope of the term "employee" as used in the Act should be deemed to be the prerogative of the administrative body, and that such terms should be interpreted to include all persons who "function in a realistic economic sense as employees of an industrial enterprise" (Board's brief in United States Circuit Court of Appeals, p. 46).

The Board's counsel have further contended that the lower courts should be advised in connection with the interpretation of the National Labor Relations Act and certain other Acts, as to whether "employee" is to be interpreted in an "enlightened manner" giving effect to "realities of economic relationship" or is to be given a "narrow construction such as the court below applied to the case at bar" (Board's Petition for Writ of Certiorari, p. 25). It requires no particular imagination to appreciate that the application of such theorems or propositions would result in clothing the administrative body with authority enabling it at will to enlarge its own jurisdiction and powers under the Act beyond that clearly intended by Congress.

This court, in discussing construction of statutes, in the case of *Lynch v. Alworth-Stephens Co.*, 267 U. S. 364-370, stated:

> "and the plain, obvious and rational meaning of a statute is always to be preferred to any curious, narrow, hidden sense that nothing but the exigency of a hard case and the ingenuity and study of an acute and powerful intellect would discover."

U. S. v. First National Bank, 234 U. S. 245 at 258:

> "That this natural and usual signification of plain terms is to be adopted as the legislative meaning in the

absence of clear showing that something else was meant, is an *elementary* rule of construction frequently recognized and followed in this Court."

Von Weise v. Commissioner of Internal Revenue, 8 C. C. A., 69 F. (2d) 439, 441. Cert. Den. 292, U. S. 655.

"One of the cardinal rules for construing statutes is that the words used are to be given their common ordinary meaning in the absence of indication in the statute or in the surrounding circumstances to the contrary; but, if a definition of the word is given in the statute, that definition is controlling."

We do not believe it can be successfully maintained that the Act contains a definition as such. At most, it contains a statement declaring (in effect) that the term should be considered in its conventional, well recognized meaning and sense.

In determining the meaning of the word "employee" under the Federal Employers' Liability Act (U. S. C. A. Title 45, sec. 51), in the case of *Robinson v. Baltimore & Ohio Railroad Company*, 237 U. S. 84, at 94, 59 L. Ed. 849, at 853 (1914), this court stated:

"We are of the opinion that Congress used the words 'employee' and 'employed' in the Statute in their natural sense and intended to describe the conventional relation of employer and employee."

It is contended that Congress having failed to specifically define the term "employee" as used in the National Labor Relations Act, that it is only reasonable to presume that it intended that such term be used in its ordinary and conventional sense, and that it may likewise be reasonably presumed that Congress intended that the Act should only effect and embrace that class of persons

who came within the term "employee" as used in its conventional sense, at the time the Act was passed.

Thus, in the case of *Kepuer v. U. S.*, 195 U. S. 100, at 124, it was held:

> "It is a well settled rule of construction that language used in a statute which has a settled and well-known meaning, sanctioned by judicial decision, is presumed to be used in that sense by the Legislative Body."[23]

Again in the case of *Jones v. Goodson*, 121 Fed. (2d) 176, 180 (C. C. A. 10th, 1941), the Court in determining whether or not the relationship of employer and employee existed under the Federal Social Security Act, made the following pronouncement:

> "It must be presumed that Congress was cognizant of these well established principles at the time of the enactment of the Statute, and if different guides were intended for ascertaining whether the relationship of employer and employee existed between parties in the application of the Statute, appropriate language would have been used to indicate such purpose."

It is significant that Congress, in defining the word "employee" in the Federal Social Security Act[24] (August

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[23] "The word 'bequest' having the judicially settled meaning which we have stated, we *must* presume it was used in that sense by Congress."

U. S. v. Merriam, 263 U. S. 179, 187 (1923).

See, also:

McDonald v. U. S., 89 Fed. (2d) 128, 133 (C. C. A. 8, 1937; Cert. Den. 301 U. S. 697);

Old Colony R. Co. v. Commissioner, 284 U. S. 552-560, 52 S. Ct. 211.

[24] "The term 'employment' means any service of whatever nature performed within the United States by an employee for his employer, except . . . ." (Sundry exceptions) Federal Social Security Act.

10, 1939, C. 666, Title IX, sec. 905(a), 53 Stat. 1400; 42 U. S. C. A. sec. 1011(b)) followed the same general pattern as it adopted in defining the word "employee" in the National Labor Relations Act.

Again in interpreting the Federal Social Security Act (*supra*), the Court, in the case of *Williams v. U. S.* (7 C. C. A.), 126 F. (2d) 129, 132 (Cert. Den., 317 U. S. 655), stated:

> "It has been held by this and other courts that employment within the meaning of the Statute connotes the legal relationship of employer and employee as those terms were defined and understood at the time of the enactment—furthermore, that an independent contractor is not an employee."[25]

In discussing the term "employee", the Court stated, in the case of *Stevenson v. Lake Terminal R. Co.* (6 C. C. A.) 42 F. (2d) 357, 358, 359:

> "The congressional failure to define the term 'employee' . . . has evoked a large amount of litigation . . . and the Supreme Court has held that the term 'employee' in the Employer's Liability Act describes the conventional relation of master and servant."[26]

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[25]To like effect:

Radio City Music Hall Corp. v. U. S., 135 Fed. (2d) 715 (C. C. A. 2, 1943).

[26]See, also:

Bailey, Adm'x v. Central Vermont Railway, Inc., 319 U. S. 350, 352;

Hull v. Philadelphia & Reading Ry. Co., 252 U. S. 475, 479 (1920);

Anglim v. Empire Star Mines Co., 9 Cir., 129 F. (2d) 914, 917.

POINT I(e).

The Determination of the Meaning of the Word "Employee" as Used in the Act Is a Legal Question, and Hence a Function of the Court and Not of an Administrative Body.

Respondent contends that a word or term having a judicially settled meaning must be presumed to have been used in that sense by Congress in the framing of Acts or Laws, and that it is the prerogative of the Court, and not that of an administrative body, to determine the judicially established meaning.

As was stated by this Court in the case of

> *U. S. v. American Trucking Associations*, 310 U. S. 534, 544:
>
> "The interpretation of the meaning of statutes as applied to judiciable controversies is exclusively a judicial function."

There has been no departure by the Court from the well established rule that findings of the Board must be sustained by substantial evidence.[27] The Court below found that there was no *substantial evidence* to sustain the findings of the Board,[28] but the Board would propose, by applying a different meaning to the word "employee" to enlarge its concept and thereby extend its own jurisdiction by including in the meaning of such word persons who function in a "realistic economic sense" and in determin-

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[27] See Point 1—Sub. C in this Brief.

[28] "We think the Board is not supported by substantial evidence in its finding that the 'newsboys' are employees of the publisher whose newspaper they vend." [R. 1851.]

ing such meaning to give "effect to the realities of economic relationship." (Petition for Writ of Certiorari, p. 25.) To that end it would propose to change and enlarge the judicially established meaning of the word "employee." It is respectfully submitted that such proposals should not be approved or accepted.

Respondent's contention is not repelled by sundry cases relied upon and cited by the Board in its Petition for Certiorari.

Gray v. Powell, 314 U. S. 402.

This case involved the determination by the director of the Bituminous Coal Division of the question of whether or not a railroad company was a "producer" of coal. Under the provisions of the Bituminous Coal Act of 1937 (15 U. S. C. A., secs. 828, *et seq.*) (particularly Section 4(a)) the matter of the determination of such question was *specifically delegated by Congress to the Commission.* No such delegation with respect to the determination of the meaning of the word "employee" was made by Congress in the National Labor Relations Act —rather was the word "employee" given (in effect) by the provisions of Section 2(3) of the Act, its ordinary and conventional meaning.

The Court stated in *Gray v. Powell, supra, after discussing the delegation of certain powers to the administrative body*, as follows (p. 411):

> "Such a determination as is here involved belongs to the usual administrative routine. Congress, which could have legislated specifically as to the individual exemptions from the Code, found it more efficient to *delegate that function* to those whose experience in

> a particular field gave promise of a better informed, more equitable, adjustment of the conflicting interests of price stabilization upon the one hand and producer consumption upon the other . . . where as here *a determination has been left to an administrative body* this delegation will be respected and the administrative conclusion left untouched."

Even where such matters are specifically delegated by Congress to an administrative body as in the case of *Gray v. Powell, supra*, this Court was still careful to preserve the right of review of the acts of the administrative body, stating at page 411:

> "In a matter left *specifically* by Congress to the determination of an administrative body, as the question of exemption was here by Secs. 4-II(1) and 4-A, the function of review placed upon the Courts by Sec. 6(b) is fully performed when they determine that there has been a fair hearing, with notice and an opportunity to present the circumstances and arguments to the decisive body, and *an application of the statute in a just and reasoned manner.*"

and continuing at page 413:

> "Unless we can say that a set of circumstances deemed by the Commission to bring them within the concept 'producer' is so unrelated to the tasks entrusted by Congress to the Commission as in effect to deny a *sensible exercise of judgment*, it is the Court's duty to leave the Commission's judgment undisturbed."

South Chicago Coal & Dock Co. v. Bassett, 309 U. S. 251.

This case turned on the question of whether or not a certain employee of the petitioner, who met death while engaged in performing certain work for petitioner, was a member of a "crew" within the meaning of Longshore men's and Harbor Workers Compensation Act, 44 Stat. 1424; 33 U. S. C. A. and U. S. C. A. Supp. Sec. 901 *et seq.*, in which Act the term "employee" was restrictively defined as follows:

> "The term 'employee' does not include a master or member of a crew of any vessel nor any person engaged . . . . to load or unload . . . any small vessel. . . ."

After pointing out (p. 257) that the determination of the question of whether or not the deceased was "a member of a crew" had been *confided by Congress to the Deputy Commissioner,* the Court stated, page 258:

> "Hence the Court of Appeals correctly ruled that his (Deputy Commissioner's) finding, *if there was evidence*[29] *to support it,* was conclusive and that *it was the duty of the District Court to ascertain whether it was so supported* and, if so, to give it effect without attempting a retrial."

It will again be observed that this Court, even where authority to determine certain specific facts has been delegated by Congress, reserves the absolute right to determine whether the conclusions reached by the administrative body were justified and whether or not the evidence

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[29]Evidence means substantial evidence.
National Labor Relations Board v. Columbia Enameling & Stamping Co., (*supra*).

adduced was sufficient to support such conclusions. It is significant that in its opinion the Supreme Court duly considered and discussed, in the case of *South Chicago Coal & Dock Co. v. Bassett* (*supra*), the evidence adduced before the Commission, which statement can be applied with like effect to the case of *Gray v. Powell, supra*. Indicating rather conclusively that the right of the Courts to determine the sufficiency of evidence adduced before an administrative body or the *reasonableness of the application of such evidence in support of findings* is not to be impaired—any other conclusion would result in the sapping of judicial power as it exists under the Constitution of the United States.

A further important distinction should be noted between the case at bar and the case of *South Chicago Coal & Dock Co. v. Bassett* (*supra*). In that case petitioners urged that the question of whether or not the decedent was a member of a crew was a question of law. This Court held that (p. 258):

> "The word 'crew' does not have an absolute unvarying *legal* significance."

and at some length explained its various meanings. This, it is respectfully submitted, is not true with respect to the word "employee" which has a well established conventional and legal meaning under the common law and statutory enactments.

An examination of the cases of

Shields v. Utah Idaho Central R. Co., 305 U. S. 177;

Rochester Telephone Corporation v. U. S., 307 U. S. 125;

and

Sunshine Anthracite Coal Co. v., Adkins, 310 U. S. 381,

does not disclose any departure by the Court from the rule or principles herein contended for.

For example: the case of *Shields v. Utah Idaho Central R. Co., supra,* involved the status of respondent as to whether or not it was an inter-urban electric railway, the Act providing that if it was, it was excepted from the provisions thereof. There appeared to be no controversy respecting the meaning of the term "inter-urban electric railway," hence the question to be determined was purely a question of fact. The Court stated at pages 180, 181:

> "As Congress was free to establish the categories which should be excepted, Congress could bring to its aid an administrative agency to determine the question of fact whether a particular railroad fell within the exception, and Congress could make that factual determination after hearing and upon evidence, conclusive."

Again, in the case of *Sunshine Anthracite Coal Co. v. Adkins, supra,* we find the question turned on whether or not coal being mined by the appellant was "bituminous coal," the answer to which in turn determined whether or not *Adkins* came within the purview of the Bituminous Coal Act. The term "bituminous coal" was definitely de-

fined by the Act and as in the *Shields* case (*supra*), the meaning of the term did not appear to be in question. The Court held that Congress could delegate to the Commission the determination of such question of fact, and (p. 400):

> "That guide (the act and definitions) is *sufficiently precise* for an intelligent determination of the ultimate questions of fact by experts."

It can scarcely be contended that the definition of the word "employee" in the National Labor Relations Act is "sufficiently precise" or precise at all, save as it clearly established the intent of Congress to use the word in its customary, conventional and legal sense.[30]

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[30]Thus, by an examination of the cases of *Gray v. Powell* (*supra*), *Sunshine Anthracite Coal Co. v. Adkins* (*supra*), *Shields v. Utah Idaho Central R. Co.* (*supra*), we find full support for the statement by the Court below as follows:

> "Contrary to the cases cited (those just referred to), there is no delegation to an administrative body of power to determine whether the facts are within a specified exception to a statute, the exercise of which power involves an interpretation of terms. Rather does the instant case fall within the general rule that 'the interpretation of the meaning of statutes, as applied to justiciable controversies, is exclusively a judicial function.' United States v. American Trucking Ass'ns, Inc., 310 U. S. 534, 544." [R. 1848.]

POINT II.

There Is No Substantial Evidence Supporting the Finding or Conclusion of the Board That the Claimed Bargaining Unit for the Alleged Employees of Respondent Was an Appropriate Unit.

The Rule Fixing and Basis for Determining Eligibility for Membership in the Union Is Discriminatory, Arbitrary and Capricious.

1. AN APPROPRIATE UNIT IS ESSENTIAL.

Section 9(a)-(b) of the Act provides:

> "(a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purpose shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining . . ."
>
> "(b) The Board shall decide in each case whether . . . the Unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit or subdivision thereof."

Respondent is charged with unfair labor practices within the meaning of the Act, such charge being that respondent refused to bargain collectively with the representatives of employees. Respondent having at all times denied that the newsboys selling its newspapers were its employees, it was conceded by respondent that it was unwilling to bargain collectively with the representatives of the Union.[31]

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[31]Respondent and representatives of the Union entered into a stipulation [R. 397] a portion of which reads as follows:

[R. 399]. ". . . the representatives of the respondent in the presence of the representatives of the Union stated in effect, that the respondent, although willing to continue its long established policy of meeting and dealing with representatives of the newsboys distributing and selling its newspapers, was not willing to bargain collectively with the Union under the aforementioned certification."

By the provisions of the Act, Section 9(a), representatives designated for such collective bargaining must be selected by a majority of the employees in a unit appropriate for such purpose. The failure to bargain, therefore, to constitute an unfair labor practice, must be a failure to bargain with "representatives" who have been lawfully designated from an *appropriate* unit.

2. Evidence to Support the Board's Finding of "an Appropriate Unit" Must be Substantial.[32]

National Labor Relations Board v. Columbia Enameling & Stamping Company (supra);

Consolidated Edison v. National Labor Relations Board (supra).

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[32]In the Representation Proceedings, the Board found

"We find as did the Trial Examiner, that

(b) All full time newsboys and checkmen who are engaged to sell the News within Los Angeles, California, excluding bootjackers, temporary, casual, and part-time newsboys, constitute units (a unit) appropriate for the purposes of collective bargaining with respect to rates of pay, wages, hours of employment, and other conditions of employment. We further find that the aforesaid employees at all times material herein, constituted and now constitute units appropriate for the purposes of collective bargaining . . ." [R. 464.]

"We find, as did the Trial Examiner, that on and at all times after July 30, 1941, with respect to the News . . . the Union was the duly designated bargaining representative of a majority of the employees in each of the aforesaid appropriate units." [R. 465.]

3. THE APPROPRIATE UNIT.

The Board found in its decision of March 30, 1942, that an appropriate unit (applicable to this respondent) was [R. 464]:

> "All full time[33] newsboys and checkmen who are engaged to sell the News within Los Angeles, California, excluding bootjackers, temporary, casual, and part-time newsboys . . ."

Thus it appears that the constituency of the "appropriate unit" was developed by an application of a rule or definition which was capricious, arbitrary and discriminatory. It should be noted that two classifications appear in the finding of the appropriate unit—(1) "full time newsboys," and (2) "checkmen," engaged in selling the News in Los Angeles, California. It should be observed that "full time newsboys" are defined by stipulation as noted in footnote, but checkmen are not so, or at all, defined.[34]

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[33]In its Decision and Direction of Elections (Fourth Amendment) [R. 142], the Board found (supported by stipulation) with respect to a full-time newsboy, as follows:

> "With respect to the News, the term 'full-time' newsboy means a newsboy who sells to the general public Five, Six, Eight, Nine and Ten Star editions, or Six, Eight, Nine and Ten Star editions of the News, 5 or more days a week, and means a newsboy who sells the Four Star edition and previous editions of the News for a minimum of four hours per day between the hours of 4 o'clock a.m. and 10 o'clock a.m., five or more days a week."

[34]There are several references in the record, however, showing that the duties of the checkmen were to "count out" newspapers to other boys and for that service they received a fixed compensation. [R. 891.]

There is a dearth of testimony respecting even the approximate number of "full time" newsboys and checkmen engaged in the sale of the News. Mr. Patrick Comorre, Union Organizer, testified [R. 1148] that he estimated that there were 110 to 114 full time newsboys selling the *morning* editions. There appears to be no testimony as to how many full time newsboys there were selling the afternoon editions, *i.e.*, the Five, Six, Eight, Nine and Ten Star editions. The witness testified that he estimated [R. 864] that there were 210 to 212 full time newsboys and checkmen selling the Herald and Express. In view of the fact that some newsboys sold both the Herald and Express and the News, respondent procured a stipulation to the effect that such testimony should not be applicable to the News.[35]

Thus it appears that we do not even have an estimate of the number of full time newsboys selling any editions of the News except the Fourth and earlier editions.

The witness Comorre testified that he estimated that there were between 650 or 700 newsboys selling the Herald-Express and the News [R. 863]. Trial Examiner Kennedy evidenced particular interest with respect to the dif-

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[35][R. 865.] "Mr. Cosgrove: May we have a stipulation to the effect that the testimony given by the witness Comorre, since he was recalled to the stand yesterday afternoon late, and including his testimony this morning, is not intended to apply to the Los Angeles Times?

Mr. Mouritsen: It may be so stipulated. Also with reference to the Examiner.

Mr. L. B. Binford: And the News?

Mr. Mouritsen: Yes."

ference between the total number of newsboys selling the News and the so-called full time newsboys.[36]

Mr. William J. Harrison, Circulation Manager for the Herald and Express estimated, however [R. 1033] that there were between 2200 and 2500 newsboys engaged in the sale of the Herald and Express, and Mr. Robert L. Smith, General Manager of respondent testified respecting newsboys handling the Herald and Express and the News, that beginning with the Five Star edition, in the main the newsboys who handled the Herald and Express also sold the News [R. 1066], hence the "difference" between the 210 (full time newsboys) and the six or seven hundred (newsboys) referred to by Trial Examiner Kennedy could probably have more accurately been referred to as the difference between 210 and 2200.

Inasmuch as there is nothing in the record from which the approximate number of "full time newsboys" and

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[36][R. 864.] "Trial Examiner Kennedy: . . . Now, as to this large balance here, the difference between 210 and the six or seven hundred, has the Union ever taken any of those in? A. Well, when they have wanted to come in or asked us to take them in we have taken them into the Union, *but we prefer not to have them.*

Trial Examiner Kennedy: Do you have any idea of about how many of that class you have in the Union now? A. No. They go and come so much that you can't hardly figure them. At the present time I don't know.

Trial Examiner Kennedy: Well, what is the reason you don't want them in the Union? The Witness: Well, because they—well, my reason would be that they don't work steady; they are going and coming and they don't depend on it for a livelihood."

Thus it would appear that the rule or basis for eligibility was not necessarily adhered to.

checkmen engaged in selling the News within Los Angeles, California, can be ascertained, it is impossible to determine whether or not the membership in the Union of "full time newsboys" and checkmen represents any substantial percentage of such newsboys and checkmen. It appears, as a matter of fact, that Mr. Comorre, Union Organizer, determined who were full time newsboys and checkmen on the basis of what he "considered" them to be.[37]

Common interest, methods of sale, working conditions, character of work—none of these elements were considered with respect to eligibility. It appears from the definition of full time newsboys, *supra*, that no newsboy who sells only the four star edition of the News, even though he worked four hours per day, five or more days a week, would be a full time newsboy. Notwithstanding the fact that the newspaper is printed six days a week and sold by newsboys six days a week, eligibility is based on five days service. Why it was established at five or six or four does not appear. Under the arbitrary definition boys selling the eighth, ninth and tenth editions of the

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[37] [R. 863-864]:

"Q. (By Mr. Mouritsen): Mr. Comorre, you estimated that there were some 600 newsboys, 600 or 700, in the city and of that there were about 220 checkmen and 210 or 212 checkmen and full time hustlers. Of what does the difference between 212 and 700 newsboys consist? What type of newsboys are they? A. Well, the 210 or 212, *that is what I considered* was the full time newsboys and checkmen, and the rest of them were boys that come out after school, as I think I explained before in the previous question."

News five or more days a week do not qualify as a full time newsboy, although obviously their hours would be as long or longer than the boys selling the early morning editions.

Thus it appears that even though a newsboy sells the same editions of the News as another boy, purchases papers from the same district man, works under the same conditions, he may still be disqualified as a full time newsboy for various reasons. No such restrictions are placed upon checkmen.

It is respectfully submitted that there is no substantial evidence supporting the existence of an appropriate unit. The finding of an appropriate unit must be supported by substantial evidence.

National Labor Relations Board v. Carlisle Lumber Co., 94 Fed. (2d) 138, 142 (C. C. A. Ninth, 1937);

National Labor Relations Board v. Lund, 103 Fed. (2d) 815, 819 (C. C. A. Eighth, 1939);

Pittsburgh Plate Glass Co. v. National Labor Relations Board, 313 U. S. 146, 152.

Conclusion.

It is earnestly contended and respectfully submitted:

That the Findings of the Board declaring that newsboys selling respondent's newspapers are its employees, are not supported by substantial evidence;

That the Findings of the Board with respect to the establishment of an "appropriate unit" are not supported by substantial evidence;

That the decision of the Court below should be affirmed.

Respectfully submitted,

THOMAS S. TOBIN,
Attorney for Respondent Stockholders Publishing Co., Inc.

BINFORD & BINFORD,
L. B. BINFORD,
HOWARD M. BINFORD,
Of Counsel.